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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 656

WILBUR F. BOOTH

vs.

THE UNITED STATES.

No. 657

CHARLES F. AMIDON

vs.

THE UNITED STATES.

ON CERTIFICATES FROM THE COURT OF CLAIMS

BRIEF FOR THE PLAINTIFFS

OPINIONS BELOW

The Court of Claims has not rendered an opinion.

JURISDICTION

The cases reached this Court on certificates from the Court of Claims, pursuant to Section 3(a) of the Act of February 13, 1925 (Chap. 229, 43 Stat. 936; U. S. C., Title 28, Sec. 288).

THE QUESTIONS CERTIFIED

1. Does a United States District or Circuit Judge who, having served continuously for ten years and

attained the age of seventy years, does not resign but retires under the provisions of Section 260 of the Judicial Code, as amended, continue in office within the meaning of Section 1 of Article III of the Constitution, which forbids diminution of the compensation of judges during their continuance in office?

2. Where the salary of a United States District or Circuit Judge is increased by law after his appointment, and he has subsequently retired in full compliance with the provisions of Section 260 of the Judicial Code, as amended, is a reduction of his compensation as a retired judge to an amount not below that fixed by law as his salary at the time of his appointment a diminution of his compensation within the meaning of Section 1 of Article III of the Constitution?

STATUTES INVOLVED

The provision for retirement in Section 260 of the Judicial Code, as amended by the Act of February 25, 1919 (Chapter 29, Section 6, 40 Stat. 1157; U. S. C., Title 28, Sec. 375), and by the Act of March 1, 1929 (Chapter 419, 45 Stat. 422), is as follows:

> "When any judge of any court of the United States, appointed to hold his office during good behavior, resigns his office after having held a commission or commissions as judge of any such court or courts at least ten years, continuously *or otherwise,* and having attained the age of seventy years, he shall, during the residue of his natural life, receive the salary which is payable at the time of his resignation for the office that he held at the time of his resignation. But, instead of resigning, any judge other than a justice of the Supreme Court, who is qualified to resign under the foregoing provisions, may

retire, upon the salary of which he is then in receipt, from regular active service on the bench, and the President shall thereupon be authorized to appoint a successor; but a judge so retiring may nevertheless be called upon by the senior circuit judge of that circuit and be by him authorized to perform such judicial duties in such circuit as such retired judge may be willing to undertake, or he may be called upon by the Chief Justice and be by him authorized to perform such judicial duties in any other circuit as such retired judge may be willing to undertake or he may be called upon either by the presiding judge or senior judge of any other such court and be by him authorized to perform such judicial duties in such court as such retired judge may be willing to undertake.

In the event any circuit judge, or district judge, having so held a commission or commissions at least ten years, continuously *or otherwise,* and having attained the age of seventy years as aforesaid, shall nevertheless remain in office, and not resign or retire as aforesaid, the President, if he finds any such judge is unable to discharge efficiently all the duties of his office by reason of mental or physical disability of permanent character, may, when necessary for the efficient dispatch of business, appoint, by and with the advice and consent of the Senate, an additional circuit judge of the circuit or district judge of the district to which such disabled judge belongs. And the judge so retiring voluntarily, or whose mental or physical condition caused the President to appoint an additional judge, shall be held and treated as if junior in commission to the remaining judges of said court, who shall, in the order of the seniority of their respective commissions, exercise such

powers and perform such duties as by law may be incident to seniority. In districts where there may be more than one district judge, if the judges or a majority of them can not agree upon the appointment of officials of the court, to be appointed by such judges, then the senior judge shall have the power to make such appointments.

Upon the death, resignation, or retirement of any circuit or district judge, so entitled to resign, following the appointment of any additional judge as provided in this section, the vacancy caused by such death, resignation, or retirement of the said judge so entitled to resign shall not be filled."

Our italics show the only changes made by the Act of March 1, 1929.

The Act to reduce pay of retired judges is Section 13 of the Independent Offices Appropriation Act, approved June 16, 1933 (Public No. 78), and is as follows:

"For the period of the fiscal year ending June 30, 1933, remaining after the date of the enactment of this Act, and during the fiscal year ending June 30, 1934, the retired pay of judges (whose compensation, prior to retirement or resignation, could not, under the Constitution, have been diminished) is reduced by 15 per centum."

The pertinent provision of Section 1 of Article III of the Constitution is:

"The judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, re-

ceive for their Services, a Compensation, which shall not be diminished during their continuance in Office."

STATEMENT

No. 656. Wilbur F. Booth, formerly District Judge, was appointed United States Circuit Judge March 18, 1925, and qualified March 27, 1925 (R. 1). He attained the age of seventy years on August 22, 1931, and by November 28, 1931, had served continuously as District or Circuit Judge for more than seventeen years (R. 2). On November 28, 1931, he addressed a letter to the President asking to retire (not resign) under those provisions of Section 260 of the Judicial Code allowing judges to retire instead of resigning (R. 5). His retirement became effective January 1, 1932 (R. 2, 6). Since retirement he has performed his judicial functions as provided by law (R. 2, 6). At the time of his appointment as Circuit Judge the annual compensation of Circuit Judges was fixed by law at $8,500 (Act of Feb. 25, 1919, Chap. 29, Sec. 2, 40 Stat. 1156). It was increased to $12,500 by the Act of December 13, 1926 (Chap. 6, Sec. 1, 44 Stat. 919), and stood at that figure when he retired. The 15% reduction, attempted by the Act of June 16, 1933, for retired judges, would reduce his compensation to $10,625 per annum. The amount withheld from him under the Act of June 16, 1933, for the period from its passage to November 1, 1933, has been the sum of $697.93. He has protested to the Attorney General against the reduction (R. 2), and has been advised that, "the Department has not considered the validity of this Section [referring to Section 13 of the Act of June 16, 1933]. It is, of course, binding upon the Department and must be complied with by the dis-

bursing clerk in paying the salaries of retired judges, unless and until it is declared invalid by a court of competent jurisdiction" (R. 7).

No. 657. Charles F. Amidon was appointed Judge of the United States District Court for the District of North Dakota on February 18, 1897, by and with the advice and consent of the Senate, and took the oath of office February 27, 1897. Serving continuously in that office, he attained the age of seventy years on August 17, 1926, and on June 2, 1928, he retired, pursuant to Section 260 of the Judicial Code, as amended by the Act of February 25, 1919 (R. 1).

His letter to the President states clearly his intention to retire and not resign (R. 5). Since retirement he has been performing judicial functions as his health has permitted and as the business of the court has required, as provided by law for retired judges (R. 2).

At the date of his appointment the annual compensation of district judges was fixed by law at $5,000 (Act of February 24, 1891, ch. 287, 26 Stat. 783). It was increased to $6,000 by the Act of February 12, 1903 (ch. 547, 32 Stat. 825); to $7,500 by the Act of February 25, 1919 (ch. 29, Sec. 1, 40 Stat. 1156); and to $10,000 by the Act of December 13, 1926 (ch. 6, Sec. 1, 44 Stat. 919) and stood at that figure at the time of his retirement and at the date of the passage of the Act of June 16, 1933 (R. 2). On the latter date Congress passed the Act above quoted attempting to reduce the salaries of retired judges 15%, thus reducing Judge Amidon's compensation to $8,500 per annum. For the period from June 16 to November 1, 1933, his compensation has been paid at the reduced rate, the amount of the reduction for that period being $538.34 (R. 2). He has duly protested against the reduction, and received the payments on account (R. 2). In answer to his protest to the Disbursing Officer

of the Department of Justice, he was advised that, "the disbursing clerk is required to comply with the law, unless and until it is declared invalid by a court of competent jurisdiction" (R. 6).

These suits were thereupon begun in the Court of Claims; the United States demurred to the complaints, thus raising the constitutional questions which have been certified to this Court, and with the cooperation of the Solicitor General the cases have been advanced to be heard together as one case.

SUMMARY OF ARGUMENT

I. The Act of June 16, 1933, attempting to reduce the compensation of retired judges not only is an unconstitutional interference with the independence of the judiciary, but casts a cloud upon the judicial powers of retired judges. It is in the public interest that these questions be promptly settled, and it is the duty of retired judges to take steps to that end.

II. The Constitution forbids diminution of the compensation of judges during their continuance in office. Judges who retire, instead of resigning, continue in office. Section 260 of the Judicial Code makes a clear distinction between resignation and retirement. It provides that retired judges may continue to perform judicial functions. It only relieved them of *regular* active service. They are not disqualified to perform any of the functions of judges in regular active service. In order to perform judicial functions they must continue in office. To construe this statute as effecting removal from office of a retired judge would be to make unconstitutional its provisions that retired judges may continue to perform judicial functions. If retired judges do not continue in office, they

may not perform judicial functions; if they do continue in office, they are protected by the Constitution against diminution of their compensation.

III. Diminution of compensation after an increase is prohibited by the Constitution. It is within the words of the Constitution. The Constitution does not say merely that the compensation may not be reduced below the level fixed at the time of appointment.

A diminution after an increase is likewise contrary to the purpose of the Constitution, which is to protect the independence of the judiciary, and to induce good men to remain on the bench. If, after increases in compensation are made because of changes in living conditions or other valid reasons, the judges are subject to having their compensation reduced to the original level, the legislative branch would hold over them the power to force their resignations for economic reasons, and to interfere with their independence as directly, although possibly in a less degree, than if power existed to reduce the compensation below the amount fixed at the date of appointment.

Although the point has not been discussed in cases in the Federal courts, it has been present in some, and all their reasoning leads to this conclusion. The question has been raised, and decided in accordance with our contention, in the highest courts of North Carolina, Louisiana and Pennsylvania.

ARGUMENT

I.

It is the duty of retired judges to defend the independence of the judiciary by questioning the reduction in compensation.

Reluctant as judges may be to institute litigation of this kind affecting their personal interests, it is their bounden duty to do so. In no other way can the constitutional questions be settled. It is the duty of the judges, as well as of members of the Bar, to defend the independence of the judiciary guaranteed by Section 1 of Article III of the Constitution. The Act of June 16, 1933, not only attempts an interference with judicial independence through diminution of compensation of judges performing judicial functions, but it casts a cloud upon the judicial powers of retired judges, because if they do not continue in office their judicial acts are mere usurpations. Judge Booth and Judge Amidon represent the retired circuit and district judges, and have been chosen to raise these questions because of their long and able service, high distinction, and known freedom from mercenary motives.

In *O'Donoghue* v. *The United States*, 53 Sup. Ct. Rep. 740, this Court said:

> "It is not extravagant to say that there rests upon every judge affected nothing less than duty to withstand any attempt, directly or indirectly, in contravention of the Constitution to diminish his compensation, not for his private advantage—which, if that were all, he might willingly forego—but in the interest of preserving unimpaired an essential safeguard adopted as a continuing guaranty of an inde-

pendent judicial administration for the benefit of the whole people."

It is in that spirit these cases are presented.

II.

Retired Judges Continue in Office.

This is a self-evident proposition. If retired judges continue in office so as to retain constitutional power to function as judges, then obviously their compensation is protected by the Constitution, which forbids diminution of judges' compensation during their continuance in office.

The right of Federal judges to resign with pay is old, having been established in 1869 (Act of April 10, 1869, ch. 22, Sec. 5, 16 Stat. 44). The right of retirement is recent, having been established by the Act of February 25, 1919. The latter Act brings forward the old statute, and both are now included in Section 260 of the Judicial Code, above quoted. The only amendment since 1919 was by the Act of March 1, 1929, which eliminated the requirement of continuous service. After providing for resignation, the Section proceeds, "But, instead of resigning, any judge * * * qualified to resign * * * may retire." Thus, the two courses open to a judge are set in contrast.

To resign an office is to give it up (*Corpus Juris,* 54 p. 717). To retire from active service is something less (*Corpus Juris,* 54 p. 739). To retire from *regular* active service is still further removed from resignation. By retiring, a Federal judge does not retire from office or wholly from active service, but in the words of the statute, only "from *regular* active serv-

ice''. The service he does perform is active, though it may not be regular. He is not disqualified to perform the same service as before retirement. Of military officers, not wholly retired from the service, but retired from active duty, this Court said:

> "There is therefore a manifest difference in the two kinds of retirement, namely retiring from active service and retiring wholly and altogether from the service. * * * while not required to perform full service they are a part of the army." (*United States* v. *Tyler,* 105 U. S. 244. See, *Kahn* v. *Anderson,* 255 U. S. 1, 6.)

The provision for retirement authorizes retired judges to continue to perform judicial functions. If a retired judge ceases to hold office, he may not constitutionally serve as a judge. A judge, once out of office, may not be restored to office by an order of a senior circuit judge, or of the Chief Justice, calling upon him for service. That may only be done under the Constitution by appointment by the President. The provision for continued exercise, by retired judges, of the judicial power defined in the Constitution, would be void if by retirement they vacated their offices. This statute has now been in effect fourteen years, and during that time retired Federal judges have performed a vast amount of judicial labor. It is too late to say that by retirement they cease to hold office and that this judicial service has been without authority of law.

The Act of February 25, 1919, providing for retirement, was intended to allow retired judges to continue in office. It merely grants them a surcease of that amount of judicial labor too exacting for men of their

age and long service. It reduces their labors but not their powers. When they sit as judges, they are clothed with all the powers of judicial office. It provides two judges for the work previously done by one. The statute prescribes the rule of seniority between active and retired judges, and thus treats both as judges, holding the same office. Retirement makes little legal difference between the functions of active and retired judges. The provision for designating retired judges for certain service finds a counterpart in the law relating to active judges (Sec. 13 of the Judicial Code, 36 Stat. 1089). Even an active judge is under no more than a moral obligation to perform all of the judicial duties which his health permits and the business of his court demands. Retired judges do not receive new commissions. They continue to act under their original commissions. Retired District Judges, without any designation from the senior circuit judge, may continue to function in their own districts. *Maxwell* v. *The United States,* 3 Fed. [2nd] 906, where the Court said:

> "The short answer to all this is that Judge Smith, under his original commission, was entitled to hold the court of that district and required no designation from any one to do so. He was still a District Judge of that district, as the act itself clearly recognizes by directing, 'The judge so retiring voluntarily * * * shall be held and treated as if junior in commission to the remaining judges of said court.' Such is the construction which the act has universally received in practice in this circuit and so far as we know, in all the others."

This decision was affirmed *per curiam* in 271 U. S. 647, the point above mentioned having been covered by

the assignments of error and in both briefs. (See, also, *McDonough* v. *United States,* 1 Fed. [2nd] 147.)

Some words in Section 260 of the Judicial Code, relating to retirement, are not carefully chosen. It speaks of the appointment of a "successor" to a retired judge, and in the last paragraph, of "vacancies" caused by retirement. These words mean "successor" as regular active judge, and "vacancies" in the regular active list. We probably are overdoing the argument. Dissecting the phrases of the statute is but ringing the changes. The essential thing is that the Congress ordained that retired judges may continue to perform judicial functions, to do which, constitutionally, they must continue in office. In exchange for their continued labor they retain the constitutional protection against diminution of their compensation.

When the Act of February 25, 1919, was under discussion in the House of Representatives, Mr. Steele, in charge of the bill, said:

> "The merit of this provision is that instead of resigning the judge simply retires, and is still enabled to perform such judicial services as he is capable of performing when the business of the district demands it. The district thereby receives the benefit of such services without any additional expense to the Government."

The debate also discloses the following:

> "Mr. Rose: Under the wording of the present bill, I take it now, there will be no pensioning of the judges, as I understand the term. In other words, the judges are not retired from active service and pensionable when retired, but I understand they will always be considered as judges and be ready to perform duties when called upon, no matter what their ages may be?

Mr. Steele: That is true under the retirement feature. They are judges, and are supposed to be doing some judicial work. It is not true when they resign. There is still a retirement feature as to those who voluntarily resign." (Congressional Record, 65th Congress, 3rd Session, Vol. 57, Part 1, pp. 368-369.)

Later in the debate Mr. Graham, of the Judiciary Committee, said:

"* * * * The first part of this section makes no alteration in the existing law. The second part of the section introduces a new feature, and that is what has been denominated in these debates the retirement feature. * * * I recall an instance in our third circuit where the matter was under consideration. The presiding judge of the circuit stated that it was his desire, if he had the power, to call in Judge Gray, who had resigned, but that he could not because the resignation cut off his official function. Therefore it was that he suggested the framing of such a bill as this, * * *. It put as a reserve force those gentlemen who were able to discharge some of the duties of the office, but who wished to retire from the more active work after their service of 10 years, and passing the age of 70. They constituted a retired list which could be called upon, if they would be willing to serve, to help out in any emergency in the business and work of the court." (Congressional Record, 65th Congress, 3rd Session, Vol. 57, Part 1, p. 428.)

Under date of July 13, 1932, in a ruling (unpublished) addressed to the Attorney General for the guidance of disbursing officers, the Comptroller General considered the effect of Sections 106 and 107(a)(5) and (b) of the Act of June 30, 1932 (Public

Act No. 212). Section 106 provided that during the fiscal year ending June 30, 1933, "the retired pay of all judges (except judges whose compensation may not under the Constitution be diminished during their continuance in office) should be reduced", and Section 107(a)(5) also provided:

> "The salaries and retired pay of all judges (except judges whose compensation may not, under the Constitution, be diminished during their continuance in office), if such salaries or retired pay are at a rate exceeding $10,000 per annum, shall be at the rate of $10,000 per annum."

After quoting Section 260 of the Judicial Code containing the retirement provisions, and after referring to Section 1 of Article III of the Constitution, the Comptroller General said:

> "The judges who retire pursuant to section 375, title 28 U. S. Code, are nevertheless still in the service of the United States. (*Maxwell* v. *The United States,* 3 Fed. [2nd] 906, aff'd 271 U. S. 647.) Accordingly, the retired judges (numbers 13 to 23, inclusive, of your submission) must be held to have continued in office notwithstanding their retirement, and being judges of constitutional courts established pursuant to article III, section 1, of the Constitution of the United States, their salary may not be reduced so long as they continue on the retired list. Resigned judges occupy a different status and may not be said to have continued in office after resignation. Accordingly, they are not protected by the constitutional provisions from reduction of compensation irrespective of whether they were formerly judges of constitutional courts or legislative courts."

The Comptroller General said all there is to say on the subject.

By exercising their option to retire, these plaintiffs did not consent to a reduction in their compensation. At the time of their retirement there was no provision in the statute that on retirement their salaries could be reduced.

III.

A diminution after an increase of compensation, even though not a reduction below the rate at date of appointment, is a diminution within the letter and spirit of Section 1, Article III, of the Constitution.

This is a question affecting active as well as retired judges.

In both of the cases presented the rates of compensation fixed by law have been increased since the dates of appointment of the incumbents, and the reductions attempted by the Act of June 16, 1933, do not lower the compensation below the rates fixed by law at the dates of appointment. Nevertheless, it is a diminution of compensation during continuance in office within the meaning of the Constitution.

Such a reduction is fairly within the words of the Constitution. It is a diminution of their compensation occurring during their continuance in office. The Constitution does not say merely that the compensation shall not be diminished below the level fixed by law at the date of appointment. It forbids any diminution of the established and existing rate of compensation.

Such a diminution violates also the spirit and purpose of the Constitution.

In *Evans* v. *Gore,* 253 U. S. 245, 253, the Court said:

> "These considerations make it very plain, as we think, that the primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich. Such being its purpose, it is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other words, not restrictively, but in accord with its spirit and the principle on which it proceeds."

The Court quoted in that case the following statement of Mr. Hamilton in the "Federalist" (No. 79):

> "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. * * * In the general course of human nature, a power over a man's subsistence amounts to a power over his will."

In *O'Donoghue* v. *The United States,* 53 Sup. Ct. Rep. 740, 743, it was said:

> "In framing the Constitution, therefore, the power to diminish the compensation of the Federal judges was explicitly denied in order *inter alia* that their judgment or action might never be swayed in the slightest degree by the temptation to cultivate the favor or avoid the displeasure of that department which, as master

of the purse, would otherwise hold the power to reduce their means of support."

If the legislative branch has power to take away an increase once granted, the judges, in the performance of their judicial functions are subject to the displeasure of that department which, as master of the purse, would hold the power to reduce their means of support. The difference between taking away an increase once granted and reducing the compensation below the point at which it stood on the date of a judge's appointment, is merely one of degree.

Hamilton's statement on this subject, in the Federalist, so often quoted, is as follows:

> "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. The remark made in relation to the President is equally applicable here. In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.* And we can never hope to see realized in practice the complete separation of the judicial from the legislative power in any system which leaves the former dependent for pecuniary resource on the occasional grants of the latter. The enlightened friends to good government in every State have seen cause to lament the want of precise and explicit precautions in the State constitutions on this head. Some of these, indeed, have declared that *permanent* salaries should be established for the judges; but the experiment has, in some instances, shown that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced

to be requisite. The plan of the convention accordingly has provided, that the judges of the United States 'shall, at *stated times,* receive for their services a compensation, which shall not be *diminished* during their continuance in office.'

This, all circumstances considered, is the most eligible provision that could have been devised. It will readily be understood that the fluctuations in the value of money and in the state of society rendered a fixed rate of compensation in the Constitution inadmissible. What might be extravagant to-day, might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances, yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation. The clause which has been quoted combines both advantages. The salaries of judicial offices may from time to time be altered, as occasion shall require, yet so as never to lessen the allowance with which any particular judge comes into office in respect to him. It will be observed, that a difference has been made by the convention between the compensation of the President and of the judges. That of the former can neither be increased nor diminished. That of the latter can only not be diminished. This probably arose from the difference in the duration of the respective offices. As the President is to be elected for no more than four years, it can rarely happen that an

> adequate salary, fixed at the commencement of that period, will not continue to be such to its end. But with regard to the judges, who, if they behave properly, will be secured in their places for life, it may well happen, especially in the early stages of the government, that a stipend which would be very sufficient at their first appointment would become too small in the progress of their service."

His reasoning leads to the conclusion that a diminution after an increase is contrary to the purpose of the constitutional provision, although he does use one phrase, "The salaries of judicial offices may from time to time be altered, as occasion shall require, yet so as never to lessen the allowance with which any particular judge comes into office in respect to him", suggesting he had in mind a diminution below the rate fixed at the date of appointment.

The celebrated protest by Chief Justice Taney (157 U. S. 701) is significant on this question. He was protesting against a diminution of the compensation of the justices through the operation of a statute imposing a 3% tax on their compensation. The Tax Act was enacted in 1862 (ch. 119, Sec. 86, 12 Stat. 472). Chief Justice Taney was commissioned on March 15, 1836. At that time the salary fixed by law for the Chief Justice was $5,000 per annum (Act of February 20, 1819, 3 Stat. 484). By the Act of March 3, 1855 (10 Stat. 643, 655) the salary of the Chief Justice was increased to $6,500 per annum, and it stood at that figure at the date of the passage of the taxing statute in 1862, no further change in the salary of the Chief Justice having been made until 1871 (Act of March 3, 1871, 16 Stat. 494). The 3% tax to which Chief Justice Taney objected did not operate to reduce

his compensation below the rate at which it stood when he was appointed. Four of the associate justices serving with him in 1863 (Justices Wayne, Catron, Nelson and Grier) had been appointed prior to March 3, 1855, when the salaries of associate justices were increased from $4,500 to $6,000 per annum. As to none of these did the tax statute objected to reduce their compensation below that in force at the date of appointment. The protest of Chief Justice Taney made no distinction between those whose salaries had been increased since appointment and those whose salaries had not varied. He made this significant statement:

> "I am, however, not willing to leave it to be inferred from my silence that I deem it the right of the legislature to diminish in this or any other mode the compensation of the judges *when once fixed by law.*" (Italics ours.)

In *James* v. *The United States,* 202 U. S. 401, the question almost reached the surface but the decision turned on the construction of the statute.

In *Evans* v. *Gore,* 253 U. S. 245, the Court considered the case of District Judge Gore, who was appointed in 1899. The question was whether his compensation was diminished by an income tax levied by the Act of February 24, 1919. His compensation at the time of appointment was $5,000 per annum, which had been raised to $6,000 in 1903, and to $7,500 on February 25, 1919. The question of diminution of his salary to a point above the level at the time of appointment was lurking in the record, though not argued or mentioned in the opinion, but the Court must have been aware of it, as it cited *City of New Orleans* v. *Lea, infra,* and *Commonwealth* v. *Mann, infra,* in which the point had been considered and decided.

In *Miles* v. *Graham*, 268 U. S. 501, the Court considered the case of Judge Graham of the Court of Claims, who had been appointed September 1, 1919. The case related to diminution of his compensation by a tax law passed February 24, 1919, prior to his appointment. The question we are now considering was not present.

In the cases of *O'Donoghue* v. *The United States*, and *Hitz* v. *The United States*, 53 U. S. Sup. Ct. Rep. 740, relating to judges of the Supreme Court and Court of Appeals of the District of Columbia, there had been no increase in the rate of compensation since their appointment.

We have examined all of the available works on constitutional law, pertinent articles in legal periodicals, the Lawyers Report Annotated, American Law Reports, Ruling Case Law, Corpus Juris, and the Decennial and Century Digests, and find no discussion or mention of this question of reduction after an increase, except in three state decisions, where the point was raised and decided in accordance with our contention.

In *Long* v. *Watts*, 183 N. C. 99, the Supreme Court of North Carolina considered the case of a judge of the Superior Court of North Carolina who sought relief against the imposition of an income tax upon his official salary. Section 18 of Article IV of the Constitution of North Carolina contained the following provision:

> "The General Assembly shall prescribe and regulate the fees, salaries, and emoluments of all officers provided for in this article; but the salaries of the judges shall not be diminished during their continuance in office."

The point was raised that the judge's salary had been increased by law since his appointment, and that the tax did not diminish it below the original level. The Court said:

> "But it is urged that the Legislature of 1921 increased the plaintiff's salary, and, therefore, the same or any subsequent Legislature may levy a tax against it without incurring the charge of having diminished it during his continuance in office. This argument is based on the contention that by adding an additional sum, the Legislature may then tax the whole so long as the tax does not exceed the increase. Or, to state it differently, the theory of the argument is that because the Legislature thought it necessary and proper to increase the plaintiff's salary, therefore they have the right, notwithstanding the constitutional prohibition, to take it away. That the power to add carries with it the power to subtract, at least to the extent of the addition. This would entirely destroy the constitutional provision we are now considering, frustrate its purpose, and make it indeed a snare and a delusion. Any construction which tends to defeat or to nullify a fundamental principle of constitutional law, come from whatever source or quarter it may, is palpably unsound. *Commonwealth* v. *Mathues,* 210 Pa. St., 400. The Constitution is not to be so easily discarded. The moment the increase took effect it became as much a part of the plaintiff's salary as the original amount, and the whole was then protected by the constitutional prohibition against diminution. An undiminished salary is a complete salary in its entirety and not a salary less a tax."

In *City of New Orleans* v. *J. N. Lea,* 14 La. Ann.

Rep. 197, the Court considered the validity of a tax on the compensation of a Justice of the Supreme Court of that state. Article 75 of the Constitution of Louisiana, in force at that time (1859), provided:

> "The Judges both of the Supreme and inferior courts shall at stated times receive a salary which shall not be diminished during their continuance in office."

The Court said:

> "It may be, that the restriction in this Article upon the power of the Legislature refers *principally* to the diminution of the salaries of the Judges by a law fixing it at a less amount than that established at the epoch of their entrance into office.
>
> The object, however, of this Article was to secure the independence of the judiciary. If the Legislature can tax the salaries, it would be deprived of its plenary effect." (Italics ours.)

In *Commonwealth ex rel. Hepburn* v. *Mann,* 5 Watts and Sergeant 403, the Supreme Court of Pennsylvania applied a provision of the Constitution of that state, which read:

> "That the Judges of the Supreme Court and the President Judges of the several Courts of Common Pleas, shall at stated times, receive for their services an adequate compensation, to be fixed by law, which shall not be diminished during their continuance in office."

The relator, a President Judge of the Court of Common Pleas, was appointed March 5, 1839, at which time his compensation fixed by law was $1,600. By the Act of July 18, 1839, the rate of compensation was increased to $2,000 per annum, but by the Act of January 14, 1843, the latter Act was repealed. The Court,

in an exhaustive opinion, held that the Act of January 14, 1843, and also the Act of May 14, 1841 assessing a 2% tax on salaries of judges, were unconstitutional. In answering the contention that the Constitution of Pennsylvania did not prevent the Legislature from withdrawing an increase made after appointment, the Court said:

> "The sum of the argument is, that because the Legislature thought proper, by way of gratuity as it is called, to add to the salary of the relator, they have the right, notwithstanding the constitutional prohibition, to take it away. That the power that can create can likewise destroy. But this, it is obvious, is an unsound position, as it by no means follows that because, for reasons which will be hereafter stated, they thought it right and just to increase the compensation of the relator, they are at liberty to withdraw it under the pretext that as it was a gratuity, they were not constrained from resuming their bounty when they deemed it expedient. But to test the correctness of the argument, let us inquire what is the inevitable result of the position assumed by the respondent? If admitted in the extent claimed, and it is not susceptible of limitation, does it not lead to the entire frustration of the very object which the framers of the Constitution had in view, and which they have guarded with such sedulous care? If it be correct that the power over a man's subsistence amounts to a power over his will, what instrument better calculated to give the Legislature an undue and improper influence over the judicial department of the government, than by an address in the manner proposed to their hopes as well as their fears. As, for example, take the case in hand. Here the Legislature have assumed the control of the

relator, so far as he could be influenced by the possession or loss of $400 a year. Cases may occur when, with the aid of the additional salary, it may be merely a decent support of himself and family. A power therefore to reduce it may, it is obvious, be equivalent to a power to deprive him of office altogether. And the same observation is applicable to the class of Judges who are placed in a similar situation by the repeal of the Act of 19th July. Besides, this instrument of coercion or intimidation may be used as particular occasions may require, and to any extent, by the power which holds the purse-strings. The effect of it is impossible for any person to divine. It is not intentional disrespect to a co-ordinate branch, nor to the judiciary to suppose it possible that cases may arise, where, to effect a favourite object of legislative ambition, or to gratify the vindictive feelings occasioned by the frenzy and madness of party, a successful resort may be had, by such means, to the judicial tribunals of the country.

* * * * * *

It was, therefore, necessary to leave it to the discretion of the Legislature to vary its provisions in conformity to the variations in circumstances; yet under such circumstances as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation."

The purpose of the provision against diminution of compensation is to attract good men to the bench, to keep them from being forced to resign, and to avoid constraint upon their judicial acts. When Congress

raises the salaries of judicial officers, presumably it does so because of altered conditions and to provide fair compensation. As Hamilton said, "What might be extravagant to-day, might in half a century become penurious and inadequate." As the Supreme Court of Pennsylvania said, the original salary, plus the increase, "may be merely a decent support of himself and family". We find it hard to argue that power over the subsistence of Federal judges may influence their judicial acts. The unimpeachable integrity of the vast number of them refutes the suggestion that they might be swerved a hair's breadth by any thought of their personal situation. We prefer to urge that a power in the legislative branch to reduce compensation of Federal judges after a needed increase would influence good men to refrain from accepting judicial office, and would force resignations, opening the way to the appointment of judges of inferior quality or of less independence.

To diminish, after an increase, is, in the words of Hamilton, "to change the condition of the individual for the worse", and to place him "in a less eligible situation". It is to allow, what Chief Justice Taney protested against, a diminution of compensation of judges "when once fixed by law".

CONCLUSION

Both questions certified should be answered in the affirmative.

Respectfully submitted,

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